Toyota Tsusho (M) Sdn Bhd v Lau Kum Foon & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-44–02 OF 2018
NOORIN BADARUDDIN J
22 JANUARY 2019

Civil Procedure — Injunction — Mareva injunction — Whether plaintiff-applicant failed to satisfy criteria for grant of Mareva injunction — Whether plaintiff failed to explain reason for inordinate delay in applying for the injunction — Whether defendants seriously prejudiced by plaintiff's application and balance of convenience lay in refusing the injunction — Whether by not addressing issues raised by defendants in their defences plaintiff failed to make full and frank disclosure of material facts in its application — Whether plaintiff not shown it had a good arguable case

Around the middle of 2015, the plaintiff brought a suit ('the first suit') against 20 defendants, many of whom were its employees including one of its former senior managers named Henry Foo. The cause of action against the defendants was for fraud which allegedly caused the plaintiff to lose about RM179.7m. While the trial of the first suit was ongoing, the plaintiff filed the instant suit in February 2018. Both the suits were closely related; in fact, the bulk of the matters the plaintiff had pleaded in the instant suit were the same as what it had pleaded in the first suit. About eight months after the instant suit was filed, the plaintiff applied (under encl 80) for a Mareva injunction against the second to the fifth defendants ('D2 to D5'). The plaintiff had earlier obtained an ex parte injunction against the defendants ('the ex parte order'). The plaintiff's case in the instant action was that D2 to D5 had assisted Henry Foo to siphon out RM179.7m of the plaintiff's monies into their accounts and that this money trail was discovered in 2015 when the plaintiff engaged a private auditor to carry out forensic work. Apart from encl 80, the court was faced with two other instant applications — encl 93 (by D5) and encl 98 (by D2 to D4) to set aside the ex parte order. In support of encl 80, the plaintiff contended that it had a good and arguable case; that D2 to D5 had assets within the jurisdiction which were in real risk of being dissipated and that the balance of convenience lay in granting the injunction sought. While denying all of those contentions, D2 to D5 argued that there was unexplained inordinate delay on the plaintiff's part in applying for the injunction; that the plaintiff did not make full and frank disclosure of all material facts when it applied for the ex parte order and that the defendants were seriously prejudiced by the existence of that order.

Held, dismissing encl 80 and allowing encls 93 and 98:

(1) In the light of the fact that there was no evidence of risk of dissipation of assets on the part of the defendants and the absence of reasonable explanation for the inordinate delay, and failure to show any urgency, in the filing of encl 80, the court found that the defendants were seriously prejudiced by the plaintiff's application and the balance of convenience tilted in their favour to refuse the injunction (see para 64).

(2) It was mandatory for a Mareva injunction applicant to make full and frank disclosure of material facts including any defence it had reason to anticipate. In the instant case, the plaintiff failed to address in its application the issues that were raised in the defences of D2 to D5. Weighing the plaintiff's statement of claim and the grounds of its application against the defences of the defendants, it was doubtful whether the plaintiff could succeed in its claim. In her defence, D5 averred that the plaintiff did not allege any breach of fiduciary duty on her part; that she had no knowledge of, and was not involved in, the Henry Foo scheme; that the monies she received were gifts from Henry Foo with whom she was in a serious relationship and that she had no suspicions about the said monies because she knew that Henry Foo had other sources of income apart from working for the plaintiff then. As for D2 to D4, their defence was that the emails exhibited by the plaintiff merely suggested a working relationship between them and Henry Foo on matters which were totally irrelevant to the plaintiff's pleaded case (see paras 49 & 61–63).

(3) The defendants' liabilities, if any, were accessory to Henry Foo's breach of fiduciary duty. What the plaintiff had to prove was that the monies in the defendants' accounts or the defendants' assets represented its monies and/or assets which were traceable and procured from Henry Foo's breach of fiduciary duty. Therefore, the breach of fiduciary duty on Henry Foo's part had to be established first and that had yet to be determined in the first suit which was ongoing. In fact, whether the Henry Foo scheme existed was still an issue to be determined in the first suit. The plaintiff had to further show that the defendants as beneficiaries of the monies and/or assets had knowledge that the monies and/or assets they received were traceable to a breach of fiduciary duty on Henry Foo's part (see para 60).

[Bahasa Malaysia summary

Pada pertengahan tahun 2015, plaintif membawa guaman ('guaman pertama') terhadap 20 defendan, yang kebanyakannya adalah pekerjanya termasuk salah seorang bekas pengurus kanannya yang bernama Henry Foo. Kuasa tindakan terhadap defendan adalah untuk penipuan yang didakwa menyebabkan plaintif kehilangan sekitar RM179.7 juta. Semasa perbicaraan guaman pertama sedang dijalankan, plaintif memfailkan guaman ini pada Februari 2018. Kedua-dua guaman tersebut berkait rapat; malah sebahagian besar

perkara yang dipohon plaintif dalam guaman ini adalah sama dengan apa yang telah dipohonnya dalam guaman pertama. Sekitar lapan bulan selepas guaman ini telah difailkan, plaintif memohon (di bawah lampiran 80) untuk injunksi Mareva terhadap defendan kedua hingga kelima ('D2 hingga D5'). Plaintif sebelum ini telah memperoleh injunksi ex parte terhadap defendan ('perintah ex parte'). Kes plaintif dalam tindakan ini adalah bahawa D2 hingga D5 telah membantu Henry Foo untuk mengeluarkan RM179.7 juta dari wang plaintif ke dalam akaun mereka dan bahawa jejak wang ini ditemui pada tahun 2015 apabila plaintif melantik seorang juruaudit swasta untuk menjalankan kerja forensik. Selain daripada lampiran 80, mahkamah dikemukakan dengan dua permohonan lain — lampiran 93 (oleh D5) dan lampiran 98 (oleh D2 hingga D4) untuk mengetepikan perintah ex parte. Dalam menyokong lampiran 80, plaintif berpendapat bahawa ia mempunyai kes yang baik dan boleh dipertikaikan; bahawa D2 hingga D5 mempunyai aset dalam bidang kuasa yang berisiko tinggi untuk hilang dan imbangan kebarangkalian terletak dalam pemberian injunksi yang dipohon. Dengan menafikan semua pertikaian tersebut, D2 hingga D5 berhujah bahawa terdapat kelewatan yang tidak jelas tentang bahagian plaintif dalam memohon injunksi tersebut; bahawa plaintif tidak membuat pendedahan penuh dan terus terang semua fakta material apabila ia memohon perintah ex parte dan bahawa defendan telah diprejudis secara serius oleh kewujudan perintah tersebut.

Diputuskan, menolak lampiran 80 dan membenarkan lampiran 93 dan 98:

(1) Berdasarkan fakta bahawa tidak ada keterangan risiko pelupusan aset di pihak defendan dan ketiadaan penjelasan munasabah untuk kelewatan yang besar, dan kegagalan untuk memperlihatkan apa-apa keperluan segera, dalam pemfailan lampiran 80, mahkamah mendapati bahawa defendan telah diprejudis secara serius oleh permohonan plaintif dan imbangan kebarangkalian berpihak kepada mereka untuk menolak injunksi (lihat perenggan 64).

(2) Adalah wajib bagi permohonan injunksi Mareva untuk membuat pendedahan penuh dan terus terang fakta-fakta material termasuk pembelaan yang mempunyai sebab untuk dijangka. Dalam kes ini, plaintif gagal untuk mengemukakan dalam permohonannya isu-isu yang dibangkitkan dalam pembelaan D2 hingga D5. Menimbang pernyataan tuntutan plaintif dan alasan permohonannya terhadap pembelaan defendan, adalah diragui sama ada plaintif dapat berjaya dalam tuntutannya. Dalam pembelaannya, D5 menyatakan bahawa plaintif tidak mendakwa apa-apa pelanggaran kewajipan fidusiari di pihaknya; bahawa dia tidak mengetahui, dan tidak terlibat dalam, skim Henry Foo; bahawa wang yang dia terima adalah hadiah dari Henry Foo dengan siapa dia berada dalam hubungan yang serius dan dia tidak mempunyai syak wasangka mengenai wang tersebut kerana dia tahu bahawa Henry Foo mempunyai sumber pendapatan lain selain bekerja untuk plaintif ketika

itu. Bagi D2 hingga D4, pembelaan mereka adalah bahawa emel yang diekshibitkan oleh plaintif semata-mata mencadangkan hubungan kerja di antara mereka dan Henry Foo mengenai hal-hal yang sama sekali tidak relevan dengan kes yang dipohon plaintif (lihat perenggan 49 & 61–63).

(3) Liabiliti defendan, jika ada, adalah aksesori terhadap pelanggaran kewajipan fidusiari Henry Foo. Apa yang patut dibuktikan oleh plaintif adalah bahawa wang dalam akaun defendan atau aset defendan mewakili wang dan/atau aset yang dapat dikesan dan diperolehi daripada pelanggaran kewajipan fidusiari Henry Foo. Oleh itu, pelanggaran kewajipan fidusiari terhadap bahagian Henry Foo perlu dibuktikan terlebih dahulu dan masih belum ditentukan dalam guaman pertama yang sedang dijalankan. Malah, sama ada Skim Henry Foo wujud masih menjadi isu yang perlu ditentukan dalam guaman pertama. Plaintif perlu menunjukkan lagi bahawa defendan sebagai benefisiari wang dan/atau aset mempunyai pengetahuan bahawa wang dan/atau aset yang mereka terima dapat dikesan untuk pelanggaran kewajipan di bahagian Henry Foo (lihat perenggan 60).]

Notes

For cases on Mareva injunction, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4729–4820.

Cases referred to

Amixco Asia Pte Ltd v Bank Negara Indonesia 1946 [1992] 1 SLR 703, CA (refd)

Ang Chee Huat v Engelbach Thomas Joseph [1995] 2 MLJ 83, CA (refd)

Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor [1995] 2 MLJ 734; [1995] 3 CLJ 359, CA (refd)

Bakmawar Sdn Bhd v Malayan Banking Bhd [1992] 1 MLJ 67; [1991] 2 CLJ Rep 323, HC (refd)

Bank Mellat v Nikpour [1985] FSR 87 (refd)

Creative Furnishing Sdn Bhd v Wong Koi [1989] 2 MLJ 153; [1989] 1 CLJ Rep 22, SC (refd)

Honsaico Trading Ltd v Hong Yiah Seng Co Ltd [1990] HKCU 429; [1990] HKCA 297, CA (refd)

Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals [2013] 2 MLJ 174, CA (refd)

Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors [1997] 5 MLJ 77, HC (refd)

Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party) [1988] 3 All ER 178, CA (refd)

Madoff Securities International Ltd and another v Raven and others [2012] 2 All ER (Comm) 634, QBD (refd)

Mareva Compania Naviera SA v International Bulkcarriers SA; The Mareva [1980] 1 All ER 213, CA (refd)
Menk Sdn Bhd v Joerg Hugo Schmidt [2009] 3 MLJ 205; [2009] 4 CLJ 795, CA (refd)
Motor Sports International Ltd (Servants or Agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd [1996] 2 MLJ 605, CA (refd)
Ooi Meng Khin v Amanah Scotts Properties (KL) Sdn Bhd [2014] 6 MLJ 488, CA (refd)
Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd [1988] 2 MLJ 261 (refd)
S & F International Limited v Trans-Con Engineering Sdn Bhd [1985] 1 MLJ 62; [1985] CLJ Rep 280, FC (refd)
Zarina bt Sharil & Anor v Chiong Chuan Hwa & Ors [2009] 2 MLJ 124, HC (refd)

Legislation referred to

Rules of Court 2012 O 29 r 1(2A), O 32 r 6, O 42 r 13, O 45 r 11, O 92 r 4

Sharon Chong Tze Ying (Muhammad Suhaib bin Mohamed Ibrahim with her) (Skrine) for the plaintiff.
Gideon Tan (Ee Yen Chin with him) (Gideon Tan Razali Zaini) for the second, third and fourth defendants.
Razlan Hadri bin Zulkifli (Nur Allya bt Abd Rahim and Danny Soong with him) (Gan Ho & Razlan Hadri) for the fifth defendant.

Noorin Badaruddin J:

[1] Three enclosures were heard before this court on 28 November 2018:

(a) encl 80 is the plaintiff's ex parte application for injunction and other reliefs against the second to the fifth defendants upon various terms set out in the application;

(b) encl 93 is the fifth defendant's application pursuant to O 32 r 6 and/or O 45 r 11 and/or O 92 r 4 of the Rules of Court 2012 ('the ROC') to discharge and set aside the ex parte order ('ex parte order') granted by this court dated 24 October 2018; and

(c) encl 98 is the second to the fourth defendants' application pursuant to O 29 r 1(2A) and/or O 32 r 6 and/or O 42 r 13 of the ROC to set aside the ex parte order and further other reliefs.

[2] This court granted order in terms of encls 93 and 98 on 28 November 2018. On the same date encl 80 was dismissed and the ex parte order against the second to fifth defendants were discharged and set aside. The reasons now follow.

A BRIEF BACKGROUND/FACTS

[3] At the outset, the present suit is cognate to an ongoing suit namely Suit No 22NCC-216–07 of 2015 ('the first suit') also brought by the plaintiff herein against 20 defendants sometime around July 2015. The trial in the first suit commenced in 2016 and is currently ongoing before this court where the plaintiff has closed its case on 8 September 2017 and the first defendant therein by the name of Henry Foo Tseh Wan ('Henry Foo') had concluded his evidence on 15 November 2018. The ongoing trial of the first suit is scheduled to continue in April 2018.

[4] In the first suit, the plaintiff is claiming that it has been a victim of what it called, the 'Henry Foo Scheme' which is said to be orchestrated by Henry Foo, the first defendant therein who was the plaintiff's senior manager in its' Johor Bharu office at the material time. The first suit was lodged against all the defendants therein on the ground that they have defrauded the plaintiff by trading goods which is alleged to be fake super engineering plastics which resulted into a loss amounting to RM179,744,989.92 suffered by the plaintiff. The plaintiff has carried out laboratory testing on the samples of the different products delivered by its suppliers and found that the samples of 40 products are of fake quality when the plaintiff had contracted to purchase high quality plastics known as super engineering plastics. Henry Foo is stated to have been involved in creating fake warehouse and customers' stamps and to creating fake documents as well as giving instructions to the Johor Bharu employees (the individual defendants in the first suit) to create the fake documents.

[5] The plaintiff commenced the present suit on 2 February 2018 and was initially fixed before the Kuala Lumpur High Court NCC4. On 10 July 2018, the Kuala Lumpur High Court NCC4 granted in favour of the plaintiff's application to transfer the present suit before this court. Approximately eight months after the commencement of the present suit, and soon after the transfer application was allowed, the plaintiff filed the present application vide encl 80 leading to the granting of the ex parte order on 24 October 2018.

H THE PARTIES THE PLAINTIFF

[6] The plaintiff, Toyota Tsusho (M) Sdn Bhd is a company incorporated in Malaysia. The plaintiff is an international trading house and carries out the business of, inter alia, import, export and domestic businesses involving products such as automotive, plastic and chemical, machinery and metals. The plaintiff was incorporated in Malaysia in 1970 and is a subsidiary of Toyota Tsusho Corporation, Japan. Toyota Tsusho Corporation is listed on the Toyota and Nagoya Stock Exchange and operates through more than 936 companies in 74 countries worldwide. The Toyota Tsusho Group of companies is a

member of the Toyota Group. The plaintiff's Malaysia head office is in Kuala Lumpur and it has several offices around Malaysia, including its Johor Bahru office. Johor Bharu is the relevant office to the present claim as well as in the first suit. The Johor Bharu office falls under the plaintiff's Plastic and Chemical Department.

THE SECOND DEFENDANT

[7] The second defendant, Cham Choon Suan is said to be one of the founders of Mepcom Polymer Sdn Bhd ('Mepcom Polymer'), the 11th defendant in the first suit. The second defendant is further stated to be the Managing Director of Mepcom Polymer. Mepcom Polymer Sdn Bhd involves in trading of plastic polymer business and manufactures raw plastic materials or polymer.

THE THIRD DEFENDANT

[8] The third defendant, Lim Ah Peng (also known as 'Alvin Lim') is the Marketing Director of Mepcom Polymer.

THE FOURTH DEFENDANT

[9] The fourth defendant, Loh Sau Fui ('Michael Loh') is the husband of one Kang May Choo, the 16th defendant in the first suit. He is allegedly employed by Advanced System Polymer Sdn Bhd, the 18th defendant in the first suit.

THE FIFTH DEFENDANT

[10] The fifth defendant, Sim Seow Ling is the girlfriend of Henry Foo.

SUMMARY OF THE PLAINTIFF'S CASE

[11] It is the plaintiff's case herein that the RM179,744,989.92 loss it suffered was paid out through a chain of companies before making way to Henry Foo and the second to fifth defendants. The second to fifth defendants are stated to have directly and/or indirectly assisted in the Henry Foo scheme. It is the plaintiff's case further that the flow of monies into Henry Foo's account and the second to fifth defendant's accounts was confirmed by Mr Alexander Tan, the Senior Executive Director (Partner) of PricewaterhouseCoopers ('PwC') who was engaged by the plaintiff sometime in 2015 to conduct forensic works into the flow of monies in and/out of the plaintiff pursuant to the Henry Foo scheme. Mr Alexander Tan testified as the 11th witness for the plaintiff in the first suit.

[12] Enclosure 80 was therefore filed for the following reasons:

(a) that the plaintiff has a good arguable case against the second to fifth defendants;

(b) that there is a real risk of dissipation assets due to the lack of probity and honesty of the second to fifth defendants;

(c) the second to fifth defendants have assets within the jurisdiction; and

(d) the balance of convenience lies in granting the plaintiff the injunction sought for in the present application.

SUMMARY OF THE FIFTH DEFENDANT'S CONTENTIONS

[13] Summarily, it is the fifth defendant's contention that apart from the plaintiff having no good arguable case and that there is no real risk of dissipation of assets on her part, the ex parte order against her ought to be discharged and set aside as there are grave and unexplained delay in the plaintiff's application for the grant of the injunction. The fifth defendant further argues that the plaintiff has failed to comply with O 29 r 1(2A) of the ROC and as such the balance of convenience does not lie in the granting of the injunction.

SUMMARY OF THE SECOND TO FOURTH DEFENDANTS' CONTENTIONS

[14] In filing the present application, the second to fourth defendants rely upon, briefly on the following grounds:

(a) that there is an ordinate delay on the part of the plaintiff in filing the application for the injunction against them;

(b) that there are no cogent reasons for the plaintiff to apply for the said ex parte order on an ex parte basis and without giving notice to them;

(c) that there is no full and frank disclosure on the part of the plaintiff when applying for the ex parte order;

(d) that the plaintiff was forum shopping when applying for the ex parte order;

(e) that there is no real risk of dissipation of assets and/or funds on their part; and

(f) that they are seriously prejudiced by the ex parte order.

FINDINGS

[15] The plaintiff herein is seeking for a Mareva injunction. It is trite that the purpose of Mareva injunction is to restraint the defendants from removing or dealing with their assets within the jurisdiction which deprive the plaintiff from its fruit of litigation in the event the plaintiff is successful in its claim. The criteria for a Mareva injunction to be granted was laid down by the Supreme Court in *Creative Furnishing Sdn Bhd v Wong Koi* [1989] 2 MLJ 153; [1989] 1 CLJ Rep 22 and can be summarised as follows:

(a) the plaintiff must have a good arguable case;

(b) the defendant's assets are within the jurisdiction; and

(c) there is evidence of a real risk of dissipation or removal of the defendant's assets before judgment.

[16] Further, having considered the three principal criteria for the grant of the Mareva injunction, another important factor to be considered is the balance of convenience and that has to be determined by weighing all matters against the harm that the Mareva injunction could cause on the defendants and without which would harm the plantiff.

THE DELAY

[17] It is the plaintiff's contention that there are no unexplained and inordinate delay in the filing of the application for the Mareva injunction herein that warrant the ex parte application to be dismissed. According to the plaintiff, its application herein does not in any way prejudice the defendants. As to the time gap, in para 159 of its affidavit in support, the plaintiff avers as follows:

> 159. However, for the time gap to operate as a bar, it is essential that it should prejudice the 2nd to the 5th Defendants. Based on the facts of our case, the 2nd to the 5th Defendants will not in any way disadvantaged by the time gap as the Order will apply prospectively. In fact, the 2nd to the 5th Defendants would have had access to the fraudulent monies for a longer period and it is Toyota Tsusho who would be out of pocket as a result of the fraudulent monies received by the 2nd to 5th Defendants.

[18] The plaintiff relies on the High Court's decision in *Larut Consolidated Bhd & Anor v Khoo Ee Bee & Ors* [1997] 5 MLJ 77 where in that case there was a delay of over three years before the plaintiff therein sought redress from the court. It was held by the High Court that a delay does not in itself act as a bar to injunctive relief. The learned judge in that case held, inter alia, as follows:

> ... I hold that for delay to operate as a bar, it is essential that it should prejudice the defendants. From the facts of this case, in no way whatsoever were the defendants

A disadvantaged by the delay. In fact, the delay in this case had acted to the defendants' benefit since they have had the use of the money for the length of the delay. On the contrary, it is the plaintiffs who are out of pocket for a large sum of money.

B **[19]** In the same case, the High Court found that since the allegation was one of conspiracy, the plaintiffs therein needed sufficient evidence before proceeding against the defendants. The court stated further that:

C In view of the strictures that apply to a plea of conspiracy in that it ought to be pleaded with great particularity — and bearing in mind the requirement of the standard of proof in respect of a plea of conspiracy and further bearing in mind that all these acts were committed in a foreign land — I am satisfied the plaintiffs' explanation in respect of the delay.

D **[20]** It must be observed that the plaintiff commenced the present suit against the defendants herein as early as February 2018. It must be emphasised that the present suit is so closely connected to the first suit which was lodged in 2015 and the trial has begun since 2016. In fact, from paras 41–115 of the plaintiff's statement of claim herein relate to the same facts in the ongoing first suit which is based on a cause of action known as the 'Henry Foo Scheme'. It is E undisputed that an order for disclosure was granted against the fifth defendant in the first suit. The fifth defendant affirmed an affidavit in compliance on 14 January 2016 and filed the same on 15 January 2016. The plaintiff then filed the present suit on 2 February 2018 and applied for a transfer of proceedings to this court on 20 February 2018 in which it was granted on 10 F July 2018.

[21] In justifying its' application herein, the plaintiff relied on the testimony and witness statement of one Mr Alexander Tan, the Senior Executive Director (Partner) of PricewaterhouseCoopers ('PwC') who was engaged by the plaintiff G to conduct forensic works into the flow of monies in and/out of the plaintiff pursuant to the Henry Foo scheme. The plaintiff in para 115 of its affidavit in support admits that based on the data given to PwC, PwC is able to identify the flow of monies from it (the plaintiff) as a result of the Henry Foo scheme to the H suppliers before the moneys went into the personal bank accounts of the defendants. It is pertinent to note that Mr Alexander Tan's witness statement is dated 15 June 2017.

I **[22]** The plaintiff further relied upon email thread produced in the first suit since the trial in the first suit begun. The email thread was obtained during the plaintiff's investigation which must have commenced before the first suit was lodged in court in 2015. The email thread is evidence to show the connections between some of the defendants in the first suit and the defendants herein and the various payments said to have been made to the defendants.

[23] Against the backdrop illustrated in the above it is apparent that a period of more than six months (taking into account Mr Alexander Tan's evidence via his testimony and witness statement dated June 2017) at the very least had gone by since the plaintiff is privy to the information relating to the money flow to the defendants. In turn, there is an approximately eight months following the filing of the present suit to the filing of the ex parte application. Where the fifth defendant is concerned, she has already been identified to be the beneficiary of a large sum of money from the Henry Foo scheme at the very least in January 2016.

[24] In regards to the second and third defendants it is the plaintiff's pleaded case that they had dishonestly received funds or monies from the accounts of Mepcom Polymer. In the first suit, Mepcom Polymer is claimed to have received the sum of RM17,125,000 from the plaintiff as a result of the Henry Foo scheme. Disclosures have been given by Mepcom Polymer relating to their assets after a Mareva injunction was obtained against it in the first suit. So the plaintiff must have known that part of the RM17,125,000 that has gone into Mepcom Polymer were received by the second and third defendants which it now wants to injunct, since 2017 from the forensic investigation done by Mr Alexander Tan.

[25] In regards to the fourth defendant, he is the husband to Kang May Choo the 16th defendant in the first suit. The Mareva injunction obtained in the first suit is against a house which is jointly owned by both the fourth defendant and Kang May Choo.

[26] The plaintiff is now saying that time is needed for them to collect evidence to which this court finds the plaintiff already had with it since the Mareva injunction was obtained in the first suit together with the information obtained from the forensic investigation of Mr Alexander Tan in 2017.

[27] To add further, the defendants herein had filed their memorandum of appearance since April 2018. Since then there were exchange of pleadings that took place until sometime around June 2018 and yet there was no application for a Mareva injunction by the plaintiff until the present suit was transferred to this court on 10 July 2018. There seems to be no urgency in the plaintiff's ex parte application for the Mareva injunction herein and this court finds that even at this stage, there is in fact no justifiable explanation as to the delay in filing encl 80.

[28] The only averment as to the delay in its affidavit in support affirmed by Toshihiro Sadowara is as per para 159; ie '... that the Defendants will not in any way be disadvantaged by the time gap as the Order will apply prospectively'. When the plaintiff was challenged as to the delay, in its affidavit in reply this

time around affirmed by one Shinichi Sato, all that is stated is as per para 7 that 'these causes of action need to be pleaded with great particularity and require sufficient evidence. The Plaintiff needed some time to trace and confirm the necessary information and evidence before the 2nd suit and the Plaintiff's Application for Ex Parte Mareva Injunction could be filed'.

[29] The respond by the plaintiff in its affidavit in reply quoted in the above raises more question than answer. What exactly that the plaintiff needs to do to trace and confirmed the necessary evidence? As stated earlier, the plaintiff is relying on Mr Alexander Tan's witness statement and testimony where money is shown to have gone to the defendants. Mr Alexander Tan's witness statement is dated 15 June 2017. The money trail must have at the very least been completed before 15 June 2017. Mr Alexander Tan has testified and explained the transaction. In fact, the plaintiff in its affidavit in support has admitted that PwC was able to identify the flow of monies from it into the defendants' accounts. What then could be the 'sufficient particularity' that the plaintiff needed to plead before the ex parte application is filed in October 2018 when all that are pleaded in its statement of claim ie the money flow and the working relationship/relationship of the defendants with Henry Foo, are information or particulars to which the plaintiff are already privy to at the very least since mid-2017. This court is of the considered view that the explanation and/or justification as to the delay by the plaintiff is feeble.

[30] In a proper case, an ex parte application can be made but true urgency must exist in making such application. That principle is enshrined in O 29 r 1(2A) of the ROC. In the present matter, this court finds that there is an inordinate delay on the plaintiff's part in applying for the Mareva injunction from the commencement of the present suit until the filing of the ex parte application. In *Larut Consolidated Bhd & Anor* it was held that if there is a delay, there must be an explanation in the affidavit in support and the court will have to consider whether the delay is reasonable before exercising its discretion to grant the interlocutory injunction. In *Ayer Molek Rubber Co Bhd & Ors v Insas Bhd & Anor* [1995] 2 MLJ 734; [1995] 3 CLJ 359, the Court of Appeal held:

> [3] As is explicit in O 29 r 1(2) of the RHC 1980, although mandatory injunction could be granted on interlocutory application, it ought not to be granted in the absence of evidence of an emergency or urgency. There is no urgency shown in the present case, and as such, it was quite wrong for the learned Judge to have granted relief ex parte behind the backs of the appellants. The respondents ought to have applied inter partes so as to give the appellants a proper opportunity to be heard.

[31] The plaintiff relies heavily on the case of *Larut Consolidated Bhd* where the delay of three years was found to be inoperative to bar the grant of an injunction. However, in that case the investigation was lengthy. The learned judge in that case had to consider the fact that the defendants therein were

protected by Chinese officials. There were government to government assistance sort of, rendered in the investigation. There were sordid details of the seizure disclosed. The High Court accepted the fact that the plaintiff therein had to wait for the Malaysian Police to complete their investigation before the filing of the Mareva injunction application. There was indeed an explanation to the delay in that case.

[32] The plaintiff relied further on the case of *Madoff Securities International Ltd and another v Raven and others* [2012] 2 All ER (Comm) 634. That case is not dissimilar to *Larut Consolidated Bhd*. Explanation was afforded as to the delay. This can be seen from the judgment of the Queen Bench Division as follows:

> Delay
>
> [148] On the face of it, there does seem to have been delay in making the application for an injunction. The critical dates can be summarised as follows. Mr Madoff confessed and was arrested in December 2008. Mrs. Kohn was interviewed by the Austrian state prosecutor in April 2009. The present proceedings were issued on 8 December 2010. On 7 January 2011, the claimants' solicitors put the Kohn defendants on notice of their intention to apply for a freezing injunction. The present application was issued on 15 March 2011 and, allowing for time for the Kohn defendants to file evidence in response, was ultimately listed for hearing on 14–16 September 2011.
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> [149] Mr Weekes submitted that, on closer analysis, there was not in fact any delay in bringing the application for which the claimants could be blamed or which should in any sense preclude the granting of a freezing injunction. So far as the period between Mr Madoff's arrest in December 2008 and the issue of proceedings in December 2010 is concerned, the second claimant explains in his first affidavit the complexity of the investigation that had to be conducted into the affairs of BLMIS, MSIL and Mr Madoff and Mrs Kohn's involvement with them. Forensic accountants were involved in both the United States and this jurisdiction. The MSIL documents were located in 450 storage boxes and in April 2010 137,000 documents were obtained.
>
> [150] In the meantime, the second claimant had to co-ordinate a global investigation into the whereabouts of the proceeds of Mr Madoff's fraud. As he explains, the period from September to December 2010 was occupied with preparation of the particulars of claim in order that proceedings could be issued before the expiry of the two-year cut off period under United States bankruptcy laws. Having considered the second claimant's explanation, I do not consider that MSIL can be criticised for any delay before December 2010, nor indeed did Mr Mowschenson seriously levy such criticism against MSIL in his submissions.
>
> [151] Mr Weekes explained that the reason why MSIL's solicitors had put Mrs Kohn on notice in January 2011 of their intention to apply for a freezing injunction was that, once Mrs Kohn was on notice that she was under investigation, which she was from April 2009, MSIL might have faced criticism from the court if they had sought a freezing injunction on an ex parte basis. Herelied in this context on what Lord Hoffmann said in the *Olint Corp* case at [13] about parties not making applications

for injunctions ex parte or at least not doing so without some notice to the other side.

[33] The plaintiff has failed to provide reasonable explanation as to the delay in making its application herein. It is the finding of this court that the delay on the part of the plaintiff in seeking the Mareva injunction herein raises doubt on the reality of the damage or injury suffered by it.

REAL RISK OF DISSIPATION OF ASSETS

[34] The underlying principle in a Mareva order is that before such relief is granted, there must be before the court solid evidence that there is a real risk that the assets in the hand of the defendant will be dissipated. The principle was elucidated in many cases. The Federal Court in *S & F International Limited v Trans-Con Engineering Sdn Bhd* [1985] 1 MLJ 62; [1985] CLJ Rep 280 stated as follows:

> It might perhaps be convenient at this stage to concisely perpend the principles and policy underlying a Mareva order elucidated in a chain of related cases of which we need only refer to three ... Mustill J held in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH & Co KG* [1984] 1 All ER 398 that: ... (2) before such relief is granted the plaintiff must secondly show that there is a risk that assets will be dissipated: he must demonstrate this by solid evidence, eg that the defendant's previous actions show his probity is not to be relied upon or that the corporate structure of the defendant infers that it is not to be relied upon, but mere proof that the defendant is incorporated abroad will not suffice.

[35] In *Ang Chee Huat v Engelbach Thomas Joseph* [1995] 2 MLJ 83 (CA) the Court of Appeal stated that the conduct of the defendant has to be considered to see whether there is a real risk of dissipation of assets. In *Ang Chee Huat* it was found that there was lack of probity and honesty on the part of the defendant and therefore, there was a real risk that the defendant would dissipate his assets.

[36] Further examples of conduct that justify a finding that there is a risk of dissipation of assets are illustrated from cases highlighted by the plaintiff such as:

(a) *Petowa Jaya Sdn Bhd v Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261 where there is 'solid evidence that the probity of the defendant could not be relied on';

(b) *Amixco Asia Pte Ltd v Bank Negara Indonesia 1946* [1992] 1 SLR 703 where the Singapore Court of Appeal found that there is 'prima facie dishonest conduct';

(c) *Honsaico Trading Ltd v Hong Yiah Seng Co Ltd* [1990] HKCU 429; [1990] HKCA 297 where the Hong Kong Court of Appeal stated when

there is 'an unacceptable low standard of commercial morality'; and

(d) *Zarina bt Sharil & Anor v Chiong Chuan Hwa & Ors* [2009] 2 MLJ 124 where the High Court stated that the 'illegal conduct' of the defendants 'imputes dishonesty giving rise to a real danger of dissipation'.

[37] In contrast with the present case, after a 'hiatus' on the part of the plaintiff in making the application herein against the defendants despite the trial of the first suit so connected to the present suit has begun for two years, the plaintiff has failed to show any evidence that the defendants had acted dishonestly or lacked of probity which could give rise to a risk that their assets will be dissipated. No evidence is proffered to show that throughout the two years there were attempts of dissipation of assets by the defendants. The only averment made by the plaintiff in relation to such risk of dissipation is that the defendant know or would know that the monies or assets they received are traceable to a breach of fiduciary duty/trust on the part of Henry Foo towards the plaintiff or alternatively was put on a duty to inquire further and had failed to do so.

[38] In regards to the fifth defendant, it must be reiterated that the fact the fifth defendant is said to have received RM2.3m from the Henry Foo scheme is not a new fact. The fifth defendant has admitted in her disclosure affidavit way back in January 2016 of the money and other asset she received. It is apparent that the fifth defendant made no attempt to hide that fact. No inconsistency is identified in any of her affidavit as to that fact.

[39] The plaintiff on the other hand avers that 'with large amounts of money at stake and with the dishonesty involved in this scheme, it is believed that the Defendants would not hesitate to preserve their self-interest by moving their assets out of reach once they have knowledge of these proceedings'. Then the plaintiff further points out that as the fifth defendant is the girlfriend of Henry Foo, she would have known that the latter could not have afforded to forward to her a large sums of monies.

[40] The fact that a large sum of monies is at stake and that a person has received such monies cannot be gainsaid to be solid evidence of lack of probity and dishonesty. For that matter, the dishonesty on the part of Henry Foo himself as the main player of the Henry Foo scheme is on trial in the first suit and has yet to be determined. Repetitious contentions are not evidence. They cannot be 'solid evidence' as envisaged by Abdoolcader FJ (as he then was) in *S & F International Limited*.

[41] At the risk of repetition, the plaintiff knew that the fifth defendant had received monies from Henry Foo as early as 2016 and the present suit by the

plaintiff was filed in February 2018. Enclosure 80 was only filed in October 2018. In the period of two years from the date the plaintiff knew of the fifth defendant being the beneficiary to the monies and asset in question to the date of filing the present action, the plaintiff is unable to show evidence of risk that the fifth defendant will or may dissipate her assets.

[42] In regards to the second to fourth defendants, it is important to highlight that the money transactions alleged by the plaintiff to have been dishonestly received and/or accepted by them were transactions back in 2014–2016. Similar to the fifth defendant's position, this court finds that there is no evidence to show that throughout the two to three years, there were attempts of dissipation of assets by the second to fourth defendants. Again the plaintiff relies on its' believe that there is a real risk of dissipation of assets based on the knowledge that the second to fourth defendants ought to have known that the monies received are from the breach of fiduciary duty said to have been committed by Henry Foo towards the plaintiff and/or conspiracy between Mepcom Polymer and Henry Foo to injure the plaintiff. The delay on the part of the plaintiff in lodging the present application after being privy to the information as to the money flow to the defendants and the fact that the defendants already knew of the present suit more than six months after the present application being lodged, defeat the plaintiff's averment that 'the second to fifth defendants would not hesitate to preserve their self-interest by moving their assets out of reach once they have knowledge of these proceedings'.

[43] Further, there is an ongoing and enforceable Mareva injunction against Mepcom Polymer in the first suit. The plaintiff has effectively restrained Mepcom Polymer from dealing and/or disposing their assets pending the conclusion of the first suit. Mepcom Polymer has been directed to submit its trial balance sheet and profit and loss statement every month for the plaintiff to keep track on its ongoing business. It is highlighted that in the financial year statement ended 2015 and 2016 show that the assets, both current and non-current of Mepcom Polymer is more than sufficient to answer the plaintiff's claim should it succeed in the first suit.

[44] It is the plaintiff's pleaded case herein that the second and third defendants dishonestly received monies from the accounts of Mepcom Polymer to which the latter is said to have received monies for the sum of RM17,125,000 from the plaintiff as a result of the purported breach of fiduciary duty by Henry Foo and/or conspiracy between Mepcom Polymer and Henry Foo. It can be seen that the present claim against the second and third defendants is an overlapping claim by the plaintiff as it originates from the claim against Mepcom Polymer for the sum of RM17,125,000. With the ongoing Mareva injunction, the plaintiff is in actual fact secured with its

RM17,125,000 against Mepcom Polymer inclusive of the sums that the second and third defendants are claimed to have received. As such it cannot be gainsaid that the second and third defendants 'would not hesitate to preserve their self-interest by moving their assets out of reach once they have knowledge of these proceedings'. Even if such security is not sufficient and argued to be a separate matter altogether, this court finds that the plaintiff fails to show that there is real risk of dissipation of assets by the second and third defendants.

[45] In regards to the fourth defendant, the husband of Kang May Choo the 16th defendant in the first suit, the plaintiff is also secured as the ongoing Mareva injunction relates to the house jointly owned by both Kang May Choo and the fourth defendant.

[46] This court finds no evidence has been shown indicating that as of October 2018, there is now a material risk that the defendants will dispose their assets.

FULL AND FRANK DISCLOSURE

[47] In the words of Donaldson LJ in *Bank Mellat v Nikpour* [1985] FSR 87, Mareva injunction is '... one of the law's two nuclear weapons. If access to such a weapon is obtained without the fullest and frankest disclosure, I have no doubt at all that it should be revoked'.

[48] In addition, regardless of the ultimate merits, a Mareva injunction application can be set aside if there is no full and frank disclosure. In *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party)* [1988] 3 All ER 178, the English Court of Appeal stated:

> if he does not comply with that duty, he will normally be deprived of the benefits of the order without consideration of the merits and irrespective of whether the non-disclosure was innocent or deliberate or whether he would have obtained the order if he had made full disclosure.

[49] It is therefore mandatory for an applicant of a Mareva injunction to make a full and frank disclosure of material facts including any defence the applicant has reason to anticipate in their ex parte application to the court. In other words, the plaintiff is required to come to court with clean hands. The requirement is embodied in O 29 r 1(2A) of the ROC. In *Motor Sports International Ltd (Servants or Agents at Federal Territory of Labuan) & Ors v Delcont (M) Sdn Bhd* [1996] 2 MLJ 605, Gopal Sri Ram JCA (as he then was) held:

> The provisions of O 29 r 2A were introduced by amendment in order to ensure that ex parte injunctions of any sort were not granted willy-nilly, but only in cases where they were truly called for. In order to ensure that the policy behind the introduction

of r 2A is not defeated, high courts must demand strict compliance with its terms. More so, when the relief applied for is in the nature of a Mareva or an Anton Piller type of injunction because of the incalculable harm and damage that may be caused to a defendant by the grant of either of these orders.

[50] In the strict terms of the requirement under O 29 r 1(2A) of the ROC, it must be emphasised that the affidavit in support of the ex parte injunction must be exhaustive of material facts and defence that the defendants have. It cannot be supplemented by an affidavit in reply of the plaintiff when challenged by the defendants.

[51] Bearing in mind the crucial test in a Mareva injunction is the real risk of dissipation of assets, apart from giving unsatisfactory explanation as to the delay in filing the present application, this court finds that the plaintiff has failed to disclose the defence by the defendants herein. In fact, there is not even an attempt to highlight the contents of the defendants' defence. The plaintiff submits that the defendants' defence has been filed and are already before the court and the plaintiff is somehow figuratively saying, so be it. Indeed, just as in the first suit, there are voluminous documents filed by the plaintiff herein that via its affidavit in support No 2, it has exhibited the entire notes of proceedings of the first suit and the cause papers in the present suit in a CD Rom containing more than 900 files. In between those files the defendants' defence are found.

[52] The learned counsel for the fifth defendant highlighted that the plaintiff in its affidavit in support had grouped and described the fifth defendant together with the second to fourth defendants when a perusal of the said affidavit itself show that the 'wrong' of the fifth defendant is materially different from the second to fourth defendants in the present suit. An example is given where unlike the second to fourth defendants, the fifth defendant was never part of any companies associated with the Henry Foo scheme. It is further highlighted that in contradistinction from the second to fourth defendants, there were no emails from the fifth defendant to Henry Foo vice versa and other defendants in the first suit relating to the Henry Foo scheme.

[53] In regards to the second to fourth defendants, learned counsel highlighted that the plaintiff had previously obtained the first Mareva injunction in the first suit against Mepcom Polymer and against Kang May Choo. In obtaining the Mareva order in the first suit, the plaintiff had effectively deposed an affidavit in support affirmed by one Mr Kazuya Kawashima on 21 July 2015. One of the salient factual information deposed by him is that the only way for the defendants who are the plaintiff's employees in its Johor Bharu office to generate purchasing orders ('PO') is through the plaintiff's accounting system known as WEST system. That piece of

information is deposed from paras 48–52 of the plaintiff's affidavit in the first suit. That factual information deposed by the plaintiff is contested by the defendants in the first suit. However, according to the learned counsel for the second to fourth defendants, in the present suit, the wordings adopted by the plaintiff in its affidavit in support carries a different meaning from the language it used in its affidavit in the first suit wherein the plaintiff is now stating that its PO would *usually* be generated and issued through its WEST system. No explanation was given as to the different position taken by the plaintiff in this present suit with the first suit.

[54] It is highlighted further that the plaintiff has also omitted to disclose that there were POs that were not generated from the WEST system but yet transacted upon by the plaintiff and no objections were taken relating to those transactions.

[55] This court finds that those facts/defence raised by the defendants are material facts that ought to be disclosed to the court by way of the plaintiff's affidavit in support. There cannot be a situation where the plaintiff select information which according to it is sufficient information to justify the Mareva injunction and that where the defendants are concerned it is for the court to see their defence without having to have the plaintiff to highlight them. The plaintiff fails to fulfil the requirement of full and frank disclosure, a principle mandatorily required to justify a Mareva injunction. In *Bakmawar Sdn Bhd v Malayan Banking Bhd* [1992] 1 MLJ 67; [1991] 2 CLJ Rep 323, Siti Norma J (as she then was) stressed upon the importance of full disclosures in an ex parte application of this nature. The learned judge stated:

> It is true that the defendant's letter was exhibited to the plaintiff's ex parte application but it is incumbent upon the plaintiff on an ex parte application of this nature not only to make full disclosures but also to draw attention to all relevant factors so as not to mislead the court into making an order that it would not have necessarily made. Had my attention been drawn to the fact that the second limb of the interim injunction was no longer necessary as the Biro had already been informed of the plaintiff's account, I would not have granted the order. In this case the court has been misled into believing that the Biro has not yet been informed of the plaintiff's account and on this ground alone, the interim injunction — at least the second limb of the injunction must be dissolved.

GOOD ARGUABLE CASE

[56] A good arguable case is one which on evidence as a whole, a plaintiff will be able to succeed at trial. Such meaning has been encapsulated in plethora of cases relating to Mareva injunction. Evidence as a whole would mean that the court must not only look at the plaintiff's case but that of the defendants as well. In *Menk Sdn Bhd v Joerg Hugo Schmidt* [2009] 3 MLJ 205; [2009] 4 CLJ 795, the Court of Appeal held:

A Good Arguable Case

[22] Scrutinising the judgment of the learned judge, he had opined and equated the existence of a serious question to be tried, which was connected to the contract of service requiring a full-blown trial, with a good arguable case. We viewed this opinion as a misdirection as he had stopped short at that. The learned judge should have taken the extra step of assessing the facts and thenceforth arrive at a finding whether a good arguable case had been established.

[23] As stated much earlier, in order to succeed in a Mareva injunction application, a plaintiff must establish for starters a good arguable case. What is arguable has to be in relation to the whole case and not some isolated minor issue or supplementary argument. As an example, the learned judge here had posed the supplementary question as regards the law applicable ie, whether it be German or Malaysian. He said, since it fell within the realm of question of fact, it could only be determined at a full trial, whereupon he remarked that with that latter issue left unresolved a good arguable case thus was established. Not only a wrong test had been applied again, but to elevate and equate this issue of choice of law, which is a supplementary argument with the concept of a good arguable case, would militate against the law of Mareva injunction as prognosed in the preceding paragraphs. A good arguable point does not tantamount to a good arguable case; the totality of points may qualify as a case. On the other hand, lest this panel be accused of oversimplification, we are not unmindful that if a point on its own may lead to the applicant having a fair chance of success, then it cannot be minor or purely supplementary.

...

[26] To arrive at a finding that a case is arguable, let alone a good arguable case, a judge hearing a Mareva injunction application must assess the available evidence beforehand. Unless that is done, the presiding judge will be unable to decide whether the applicant has a fair chance of obtaining judgment, if the matter were to go for trial (*Biasamas Sdn Bhd & Ors v Kan Yan Heng & Anor* [1998] 4 MLJ 1; [1998] 4 CLJ 754) ...

[57] The starting point on a good arguable case, is the plaintiff's statement of claim herein which runs through 200 paragraphs. The earlier paragraphs up to para 147 relate to the same facts in the first suit. The plaintiff's cause of action against the defendants is predicated on the tort of knowing receipt or tort of dishonest assistance in the breach of fiduciary duty of Henry Foo vis a vis the Henry Foo scheme.

[58] The issue on 'knowing assistance' or 'knowing receipt' has been properly ventilated in *Ooi Meng Khin v Amanah Scotts Properties (KL) Sdn Bhd* [2014] 6 MLJ 488 where the Court of Appeal laid down the ingredients to be fulfilled as follows:

(a) a disposal of the plaintiff's assets in a breach of fiduciary duty;

(b) the beneficial receipt by the defendant of assets which are traceable as representing the assets of the plaintiff; and

(c) knowledge on the part of the defendant that the assets received are traceable to the breach of the fiduciary duty.

[59] Further, in *Kuan Pek Seng @ Alan Kuan v Robert Doran & Ors and other appeals* [2013] 2 MLJ 174, the Court of Appeal through the judgment of Jeffrey Tan FCJ (as he then was) where breach of fiduciary duty was the sine qua non of the entire complaint therein discussed 'knowing assistance' as follows:

> [55] 'Knowing assistance' is one of two types of third party liabilities under trust law, established in *Barnes v Addy* (1874) LR 9 Ch App 244, and based on the following dictum of Lord Selbourne LC:
>
> > (The responsibility of a trustee) may no doubt be extended in equity to others who are not properly trustees, if they are found ... actually participating in any fraudulent conduct of the trustee to the injury of the cestui que trust. But ... strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.
>
> [56] *As a general rule, there must be a breach of trust or fiduciary duty by someone other than the defendant, the defendant must have helped that person in the breach, and the defendant must have a dishonest state of mind.*
>
> [57] In *Royal Brunei Airlines* at p 390; 107, in its overall conclusion of the accessory liability principle, the judicial committee of the Privy Council (appeal from the Court of Appeal, Brunei) clarified, per Lords Nicholls, that while dishonesty is a necessary ingredient of accessory liability, it is not necessary that in addition, the trustee or fiduciary was acting dishonestly, and that in the context of the accessory liability principle, acting dishonestly or with a lack of probity, is based on an objective standard.
>
> The only answer to these questions lies in keeping in mind that honesty is an objective standard. The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances. It is impossible to be more specific ... Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advice the trustee of the risk but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct.

A [58] The above dictum was followed in *Industrial Concrete Products Bhd v Concrete Engineering Products Bhd* [2001] 2 MLJ 332, where it was held by James Foong J, as he then was, that honesty or dishonesty must be viewed objectively. The only other Malaysian case to have applied the objective test as formulated in *Royal Brunei Airlines* was *Pharmmalaysia Bhd v Dinesh Kumar Jashbhai Nagjibha Patel & Ors* [2004] 7 CLJ 465. (Emphasis added.)

B

[60] Premised on the discussion elucidated in those cases, and the plaintiff's claim herein, the defendants' liabilities are therefore accessories to Henry Foo's breach of fiduciary duty. What the plaintiff has to prove in the present suit is C that the monies in the defendants' accounts or the defendants' assets represent its monies and/or assets which are traceable and were procured from the breach of fiduciary duty of Henry Foo. Therefore, the breach of fiduciary duty on the part of Henry Foo must be established first and that has yet to be determined in the first suit which is ongoing. In fact, whether the Henry Foo scheme exists D is still an issue to be determined in the first suit. The plaintiff must further show that the defendants as beneficiaries of the monies and/or assets have the knowledge that the monies and/or assets they received are traceable to a breach of fiduciary duty on the part of Henry Foo.

E

[61] The fifth defendant's defence herein are firstly, the plaintiff did not allege any breach of fiduciary duty on her part. Secondly, she has no knowledge and is not involved in the Henry Foo scheme. Thirdly, the monies she received are gifts from Henry Foo to whom she is in a serious relationship and finally, F that she has no reason to suspect the monies given to her as gifts as she knows that Henry Foo is a businessman with other sources of income other than from working with the plaintiff then.

[62] In the case of second to fourth defendant it is their defence that the G emails exhibited by the plaintiff cannot be said to be conclusive evidence of such knowledge since the emails merely suggest working relationship between them and Henry Foo on subject matters which are said to be totally irrelevant to the plaintiff's pleaded case.

H

[63] It is apposite to state again that the plaintiff has failed to address those issues in the above during the ex parte application and in weighing the plaintiff's statement of claim and the grounds for its application herein together with the defence put forward by the defendants, at this juncture there I are doubts on how likely the plaintiff will succeed in its claim against the defendants.

BALANCE OF CONVENIENCE

[64] In light of the fact that there is no evidence of risk of dissipation of assets on the part of the defendants, the absence of reasonable explanation as to the delay and the failure to show any urgency in making the present application by the plaintiff, it is the finding of this court that the defendants are seriously prejudiced by the plaintiff's application herein. As such, the balance of convenience tilts in favour of the defendants.

CONCLUSION

[65] Premised on the foregoing reasons, encl 80 was dismissed and this court granted order in terms of encls 93 and 98.

Enclosure 80 dismissed and encls 93 and 98 allowed.

Reported by Ashok Kumar